

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

1 THE CIRCLE, SUITE 2  
SUSSEX COUNTY COURTHOUSE  
GEORGETOWN, DE 19947

July 9, 2009

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Re: *The Laminate Company v. Lacrosse Homes, Inc. et al.*  
C.A. No. 09L-02-121-RFS

*Upon Motion to Dismiss Count One. Granted Without Prejudice.*

Dear Counsel:

In a four count complaint, The Laminate Company, t/a American Star & Cabinetry (“American”) sued Lacrosse Homes, Inc. (“Lacrosse”) and Arthur Jones, Jr. and Cindy S. Jones (“the Joneses”) to recover damages. American allegedly supplied material to Lacrosse for a home owned by the Joneses in the amount of \$15,298.42.

Count One of the Complaint seeks a mechanic’s lien against the Joneses’ property

where the materials were used. The Joneses filed a motion to dismiss that count as well as Count three based on unjust enrichment. The parties submitted written materials with oral argument on May 1, 2009.<sup>1</sup>

At that time, the Joneses' argument about the viability of American's unjust enrichment claim was rejected for the reasons stated on the record. This point may possibly be revisited after discovery through summary judgment.

As the parties know, the mechanic's lien statute is in derogation of the common law and is strictly construed. The Joneses presented a number of arguments that American failed to follow the demanding rules required for a lien. In a motion to dismiss, American's factual allegations are presumed to be true and the question is whether or not American could recover under any reasonably conceivable set of circumstances capable of proof under the complaint. Even under this exacting standard, one objection stood out and appeared to have merit. It concerned the requirement that the subject of a first construction mortgage must be addressed in the pleadings. Without compliance, dismissal would be in order.<sup>2</sup>

The pertinent statutory provision provides that a mechanic's lien complaint shall set forth:

"The time of recording of a first mortgage, or a conveyance in the nature of

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<sup>1</sup> Counts Two and Four are directed only against Lacrosse which has not filed a response.

<sup>2</sup> *Builders' Choice, Inc. v. Venzon*, 672 A.2d 1 (Del. 1995) (failure to plead subject matter of a construction mortgage was a dispositive defect in a mechanic's lien suit).

a first mortgage upon such structure which is granted to secure an existing indebtedness or future advances provided at least 50% of the loan proceeds are used for the payment of labor or materials, or both, for such structure.”

25 *Del.C.* § 2712(b)(11). Paragraph 14 of Count One alleged a mortgage from the Joneses to LHID Blueberry Hill, LLC in the amount of \$86,000 dated February 22, 2008 and recorded on May 1, 2008.

However, the Joneses’ motion to dismiss presented an apparently earlier first mortgage that American failed to plead. Paragraph 20 of their motion stated:

Plaintiff fails to identify and state the date of the first mortgage recorded against the property, namely, the construction mortgage between the Joneses and American Bank dated February 22, 2008 and recorded March 24, 2008 in the Sussex County Recorder of Deeds at Book 10315, page 250. See the first and last page of the Construction Mortgage attached hereto as Exhibit “D.”

At oral argument, the failure to plead the construction mortgage was a major point of discussion. The construction mortgage bore a stamped recording date of March 24, 2008; it was for construction at the same property subject to the mechanic’s lien. It was recorded about five weeks before the Blueberry Hill instrument. As the maximum unpaid balance for existing and future advances at any one time would be up to \$500,000, this mortgage was required to be pled.

Technically, when matters outside the pleadings are considered, a motion to dismiss is converted to one for summary judgment. However, a non-moving party like

American is entitled to ten days notice to present contrary evidentiary matters.<sup>3</sup> The purpose, of course, is to prevent an ambush. If a disputed material issue of fact exists, then the case would proceed to trial.

Here, the only question was whether the construction mortgage was recorded on March 24, 2008. American was given until May 15<sup>th</sup> to determine this status and to see if any contrary evidence could be presented. As a result, the motion to dismiss was converted to one for summary judgment with leave for American to present contrary evidence on May 15, 2009.

On May 15<sup>th</sup>, American did not question the recording of the construction mortgage or the defect in the mechanic's lien complaint for failure to plead the first mortgage. Instead, American asked that the complaint be dismissed without prejudice rather than through summary judgment. American surmised that other tenable grounds may exist to assert a mechanic's lien. The entry of summary judgment would have a *res judicata*/collateral estoppel effect that would bar this possibility.

Upon reflection, American's request is reasonable. The case is in the early stages of litigation. The purpose of the conversion was focused to the recording status of the first mortgage. Conversion gave American the opportunity to present material on this narrow point; it was not intended to foreclose unrelated points. The entry of summary judgment after discovery with a complete record has a broadly based, preclusive effect.

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<sup>3</sup> *Appriva Shareholder Litigation Co., LLC v. EV 3, Inc.*, 937 A.2d 1275, 1287 (Del. 2007).

Such a sweeping result here would be unjust.<sup>4</sup>

Considering the foregoing, Count One is dismissed without prejudice.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary

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<sup>4</sup> The Rules of Superior Court procedure “. . . should be construed and administered to secure the just, speedy and inexpensive determination of every proceeding. . .” Rule 1.